

Air 2, LLC and International Brotherhood of Electrical Workers Local 222. Cases 12-CA-21946-1, 12-CA-21946-2, 12-CA-21946-4, 12-CA-21946-5, 12-CA-22043, 12-RC-8721

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On April 28, 2003, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed cross-exceptions and supporting briefs. All parties filed answering briefs, and the Respondent and Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

Our colleague finds it unnecessary to resolve the challenge to Tracy Blackwell's ballot in order to decide the representation case. We disagree. The unusual and complicated procedure suggested by our colleague hinges on Jeff Laslovich's testimony that he voted for the Union and informed the Respondent that he had done so. She therefore proposes to count Laslovich's ballot first and address Blackwell's status only if Laslovich did not vote for the Union. We disagree. In particular, we object to a procedure under which Laslovich's electoral choice is to be ascertained on the basis of his open declarations. The Board's wise policy is that employees should be able to make their choices privately. In the instant case, Laslovich cast his ballot privately. Unlike our colleague, we would glean his desires from that ballot, rather than from his open declarations.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We find merit in the Charging Party's exception to the judge's failure to order that the notice be mailed to the Respondent's employees. We agree that because the unit employees do not have a fixed work site, it is necessary to mail the notice to the Respondent's affected employees to ensure that they are informed of our decision, and we shall modify the judge's recommended Order accordingly. We shall also substitute standard language for portions of the judge's Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Air 2, LLC, Miami, Florida, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(g).

"(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following paragraph after paragraph 2(a).

"(b) Mail a copy of the attached notice marked 'Appendix' to all current employees and former employees employed by the Respondent at any time since October 25, 2001. Such notice shall be mailed to the last known address of each of the employees above. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be mailed within 14 days after service by the Region."

3. Substitute the following for paragraph 2(b).

"(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Dated, Washington, D.C. January 30, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring.

I agree with my colleagues except as follows.

I find it unnecessary, at this time, to decide whether lead lineman Tracy Blackwell is a statutory supervisor. First, I would find that Blackwell is the Respondent's agent, as both the General Counsel and the Charging Party contend. On that basis, I agree with my colleagues and the judge that the Respondent, through Blackwell, violated Section 8(a)(1) of the Act in several respects. I therefore need not reach the issue of supervisory status to decide the unfair labor practice case.

Second, although Blackwell's ballot has been challenged, I find it unnecessary to resolve the challenge to

decide the representation case. At present, the tally of ballots shows three for the Union and two against, with three challenged ballots: those of Blackwell, Jeff Laslovich, and Marty Lyons. We are sustaining the challenge to Lyons' ballot, but overruling the challenge to that of Laslovich. Normally, it would be necessary to resolve the challenge to Blackwell's ballot because it, along with Laslovich's ballot, would determine the outcome of the election. And normally, if Blackwell's ballot were counted, it would be counted along with that of Laslovich in order to avoid, if possible, identifying how each man voted. Here, however, Laslovich testified that he voted for the Union and informed the Respondent that he had done so. I would therefore count his ballot first. If he did, in fact, vote for the Union, the ballot count would be 4 in favor of the Union and 2 against, and Blackwell's ballot would no longer be determinative. Thus, the representation case probably can be resolved without reaching whether Blackwell is a supervisor. (If it turned out that Laslovich did *not* vote for the Union, and Blackwell's ballot proved determinative, the Board could address Blackwell's status at that time.)

Like my colleagues, I reject the Union's contention that the judge erred in failing to find that the Respondent unlawfully refused to hire union organizer Jason Bonner and made unlawful statements while interviewing him. Those allegations were not contained in the complaint, and the General Counsel did not argue that the judge should find those violations. Nor did the General Counsel espouse the Union's arguments in his exceptions. As the judge correctly found, the General Counsel alone controls the allegations of the complaint, and the Union may not expand the complaint on its own. *D&F Industries*, 339 NLRB No. 73, slip op. at 4 fn. 15, 28 (2003). Had the General Counsel ever indicated that he was pursuing the Union's theory, I would be more receptive to the Union's argument.³

Dated, Washington, D.C. January 30, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

³ In affirming the judge's finding that the Respondent never offered Bonner a job, and therefore did not unlawfully withdraw such an offer, I do not rely on the judge's speculation as to the Respondent's possible reasons for its actions.

Finally, the judge found that a bargaining order is not warranted here. No exceptions have been filed to his finding, and the General Counsel has not requested that the Board issue a bargaining order.

Chris Zerby, Esq., for the General Counsel.

Paul Snitzer, Esq. and Harvey W. Gurland, Jr. Esq., for the Respondent.

Jonathan Newman, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Miami, Florida on December 16 to 20, 2002.

After making a demand for recognition on October 23, 2002, rejected by the Employer on October 25, 2002, the Union filed a petition for an election in 12-RC-8721 on November 1, 2001. Pursuant to a Stipulated Election Agreement approved on November 9, 2001 a mail ballot election was conducted beginning on November 20, 2001. The tally of ballots was issued on December 11, 2001 and showed that there were three votes cast for the Union, two votes against the Union and six challenged ballots.

With respect to the challenged ballots, the Regional Director ordered that a hearing be conducted with respect to voter eligibility of the following individuals: Tracy Blackwell, (challenged by the Union as a supervisor); Jeff Laslovich, (challenged by the Employer because his ballot was received by the Board with tape on the envelope seal); Jason Collins, James Lake, John Flynn and Marty Lyons, (challenged by the employer based on its contention that their ballots were not properly voided by the agent conducting the election). In addition, the Board also challenged the ballot of John Flynn, because his name was not on the *Excelsior* list.

On December 18, 2001, the Union and the Employer both filed objections to the election.

On August 2, 2002, the Regional Director issued a Report on objections and Challenges. At the same time, she consolidated for hearing, the representation case with the unfair labor practice allegations listed below.

The charge in 12-CA-21946-1 was filed on December 3, 2001 and was amended on April 26, 2002. The charge in 12-CA-21946-2 was filed on December 3, 2001 and was amended on March 29, 2002. The charge in 12-CA-21946-4 was filed on December 7, 2001. The charge in 12-CA-221946-5 was filed on December 7, 2001 and was amended on January 31, 2002. The charge in 12-CA-22043 was filed on January 22, 2002 and was amended on May 3, 2002.

The allegations of the consolidated complaint are as follows:

1. That from on or about February 21, 2001 through about October 15, 2001, a majority of the employees in an appropriate unit selected the Union to represent them for collective bargaining purposes. The unit being;

All full-time and regular part-time linemen, line crew foremen, and apprentices employed by the employer at its main office located at 12515 North Kendall Drive, Miami, Florida; excluding all other employees, including helicopter pilots, mechanics, professional employees, and office clerical employees, guards and supervisors as defined in the Act.

2. That on October 23, 2001, the Union made a written request that the Respondent recognize it as the exclusive collec-

tive bargaining representative for the employees in the unit described above.

3. That on or about October 25 and 26, 2001, the Respondent by Thomas McShane, its president told employees that it would be futile for them to select the Union.

4. That on or about October 25, 2001, the Respondent by McShane, threatened employees with discharge in retaliation for their union activities.

5. That on or about October 25 and 26, 2001, the Respondent by Lou Woodward, its Vice President, threatened employees with discharge in retaliation for their union activities.

6. That on or about October 25, 2001, the Respondent by Woodward, promised employees an apprenticeship program to dissuade them from supporting the Union.

7. That on or about October 26, 2001, the Respondent by Woodward, interrogated employees about their union activities.

8. That on or about October 29, 2001, the Respondent by Tracy Blackwell, its crew leader and supervisor, threatened employees with discharge in retaliation for their union activities.

9. That on or about November 1, 2001, the Respondent by Blackwell, threatened not to allow strikers to return to work unless they withdrew their support for the Union.

10. That in early November 2001, the Respondent by Blackwell, solicited employees to revoke their union authorization cards.

11. That in early November 2001, the Respondent by Blackwell, threatened that the Respondent would shut down its operations and reopen under another name.

12. That on or about November 12, 2001, the Respondent by McShane, threatened employees with the inevitability of strikes if they supported the Union.

13. That on or about November 12, 2001, the Respondent by Woodward, threatened employees with the loss of benefits including paid dinners, if they supported the Union.

14. That on or about November 13, 2001, the Respondent by Woodward, promised employees an apprenticeship program, promotions and raises in order to dissuade them from supporting the Union.

15. That on or about November 15, 2001, the Respondent by Blackwell, threatened employees with plant closure and the loss of jobs.

16. That on or about November 15, 2001, the Respondent by Blackwell threatened employees with reprisals including the loss of benefits such as the loss of traveling expenses.

17. That on or about November 16, 2001, the Respondent by Blackwell, threatened employees and union agents with physical harm, threatened employees with discharge, created the impression that employees' union activities were under surveillance and attempted to instigate violence among employees.

18. That on or about November 16, 2001, the Respondent by Woodward, interrogated employees about their union activities.

19. That on or about November 17, 2001, the Respondent by Blackwell, threatened union agents with bodily harm.

20. That on or about November 19, 2001, the Respondent by Blackwell, threatened employees with discharge and interrogated employees about their union activities.

21. That on or about November 20 and 21, 2001, the Respondent by Blackwell, threatened employees with layoffs.

22. That on or about November 26, 2001, the Respondent by Blackwell, interrogated employees about their union activities and threatened them with discharge.

23. That from November 26, 2001 through December 1, 2001, the Respondent, for discriminatory reasons delayed the return to work of Jason Collins.

24. That on or about November 27, 2001, the Respondent by Blackwell, impliedly threatened employees with discharge and interrogated employees about their union activities.

25. That on or about November 28, 2001, the Respondent by Blackwell, interrogated employees and promised them benefits including promotional opportunities.

26. That on or about November 29, 2001, the Respondent by Blackwell, interrogated employees about their union activities.

27. That on or about November 29, 2001, the Respondent by McShane, threatened employees with transfer to prevent them from engaging in union and concerted protected activity.

28. That on or about November 29, 2001, the Respondent by Woodward, created the impression that employees' union activities were under surveillance.

29. That on or about November 29, 2001, the Respondent, for discriminatory reasons required that Jason Collins get a second medical release in order to return to full-duty status.

30. That on or about November 30, 2001 the Respondent by Blackwell, impliedly threatened employees with discharge and promised unspecified benefits.

31. That on or about December 2, 2001, the Respondent, for discriminatory reasons transferred Jason Collins to light duty status.

32. That on or about December 5, 2001, the Respondent, for discriminatory reasons enforced a policy of requiring employees to wear long sleeved shirts.

33. That since December 5, 2001, the Respondent has promulgated and enforced a policy requiring employees to remove all stickers from flight helmets.

34. That on or about December 7, 2001, the Respondent, for discriminatory reasons, laid off Walter Stephens.

35. That on or about December 10, 2001, the Respondent, by Blackwell, interrogated employees and informed employees that selecting a union would be futile.

36. That on or about December 10, 2001, the Respondent, for discriminatory reasons issued a warning to Jason Collins.

37. That on or about December 10, 2001, the Respondent, for discriminatory reasons, withdrew an offer to hire Jason Bonner.

38. That on or about January 7, 2002, the Respondent, for discriminatory reasons, refused to give Walter Stephens a company jacket.

39. That on or about January 7, 2002, the Respondent threatened employees with various reprisals in retaliation for filing of unfair labor practice charges with the Board.

40. That the conduct engaged in by the Respondent has made a fair rerun election impossible and therefore the Board should grant an order compelling the Respondent to bargain with the Union irrespective of the outcome of the election.

At the hearing, the General Counsel withdrew an allegation that since December 10, 2001, certain employees have engaged in an unfair labor practice strike. (This is the same date that the election period ended). At the time of the hearing, no employee who claimed that he was engaged in a strike, had asked for his job back and therefore the Company hadn't refused to recall anyone. Therefore, the unfair labor practice strike allegation was unnecessary as any violation that might occur would commence upon the Respondent's refusal to recall such strikers. In this regard, the 10(b) statute of limitation period would not start to run until such refusal.

The Union's objections to the election basically tracked the allegations of the unfair labor practice complaint. There were, however, a few more allegations which were: (1) that the Employer's representatives made evening visits and calls to employees, (2) that on December 3, 2001, the Employer discharged John Flynn, and (3) that on December 7, 2001, the Employer laid off Walt Stephens. As to the first of these objections, the only evidence supporting it is that during the pre-election period, management representatives did go to job sites where the crews were working and visited with employees at motels where they were staying at company expense. As to the allegation regarding Flynn, I cannot consider an objection, which alleges discrimination under 8(a)(3) in the absence of corresponding unfair labor practice charges. *Texas Meat Packers Inc.*, 130 NLRB 279 (1961).

The Employer's objections to the election were as follows:

1. That the Board agent's decision to void the ballot of Marty Lyons was in error.
2. That the Board agent's decision not to open the ballot of Tracy Blackwell was in error.
3. That the Board should not open or count the ballot of Jeff D. Laslovich whose return envelope indicated that it was tampered with.

At the hearing, the Employer withdrew its Objection to the Region's decision to void the ballots of John Flynn, Jason Collins and James Lake. Therefore, there no longer is any issue as to these persons and their ballots shall remain unopened and uncounted.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations and Supervisory Status of Tracey Blackwell

The Respondent is engaged in providing power line services to electric utilities throughout the United States. It is a small company consisting of about 20 people, of whom about 10 or 11 are workers in the voting unit. Apart from its officers, sales and clerical staff, the workforce is essentially divided into two, or at times, three crews that go out on jobs and perform inspection, installation or repair work on live electric transmission lines.

Each crew will typically consist of a helicopter pilot, a helicopter mechanic, a journeyman lineman and one or two apprentices. And each job may take several weeks or more to complete. During each assignment, the crew will be out in the field, far away from the Respondent's offices, (and from home), and headed up by a crew leader. In this regard, there is a dispute as to whether crew leader Tracey Blackwell has more authority than two other individuals who also act as crew leaders and therefore should be considered a supervisor within the meaning of the Act or simply a leadman. The status of Blackwell is rather critical to this case, not only because he is one of the challenged ballots, but because most of the alleged 8(a)(1) and objectionable conduct was done by him.

With respect to Blackwell, the evidence shows that in early October 2001, he took over at least a portion of the duties of Fleming, whom the parties agree was a supervisor within the meaning of Section 2(11) of the Act.

The evidence shows that when crews are working in the field, each has a crew chief, who is responsible for the day-to-day activities of the other linemen and apprentices on the job. (At the time of these events, Marty Lyons and J.P. Flynn were typically the other crew leaders). For example, Blackwell testified that if he saw anyone doing something that he considered unsafe, he would tell them to stop. And when more than one crew works at a site, Blackwell would be the person in charge of the combined crew. (The pilots and helicopter mechanics have their own area of responsibility). Because the crews work far from headquarters and because Woodward and McShane make infrequent visits to the sites, Blackwell is the one who communicates any assignment changes or other matters between management and the employees of his crew.

There is evidence which shows that Blackwell, as a part of his job responsibilities, has been involved in the hiring of employees. Even if the record is ambiguous as to whether he can hire on his own authority, it is my opinion that the evidence shows that he has recruited, interviewed and effectively recommended hiring.

In addition, there is evidence that Blackwell can and has disciplined employees in the field. For example, there is a memorandum from Blackwell to Woodward indicating that he had suspended Tommy McKenzie for a day without pay for oversleeping. This memorandum was then forwarded from Woodward to Susan Chetwood in Human Resources. Also, Blackwell testified that he has transferred apprentices from one job to another and has done so based on his evaluation as to the kind of experience is needed on different jobs.

Blackwell is paid on a salaried basis as opposed to the other linemen and apprentices who are paid an hourly-based wage. He, unlike the others, has been offered stock options. In a letter regarding a disability claim to the insurance company, the Respondent stated that Blackwell performed supervisory functions. It stated *inter alia*; "Performs service work plus supervises others doing same."

Based on the record as a whole, it is my opinion that Blackwell has some of the powers and authority enumerated in Section 2(11) of the Act and that these were part of his regular job

functions. I therefore conclude that he is a supervisor within the meaning of the Act. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). See also *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1948); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Venture Industries*, 327 NLRB 918 (1999).

To perform their work, the journeymen and/or apprentices are taken up in a helicopter where they work either through the open door or they are landed on top of towers where electrical equipment is located. This is, to say the least, scary and dangerous work. People can and have gotten killed. And for the most part, this work is done by a group of young men who are energetic and daring. (They also are prone to more than the usual amount of rowdiness). They are also fairly well compensated because there are not that many people who are willing to do this kind of work.

I note that the crews are sent out to job sites where they live and work together for extended periods of time. They work hard and spend their off hours together at bars and restaurants. They are, perhaps, a little rough and are, like young men, prone to using tough and salty language. One described the group as a bunch of rednecks.

For the most part, the employees comprising a crew, including the crew chief, will work on a rotation basis consisting of 21 days on and 10 days off. At the end of a normal rotation, an employee will be given an airplane ticket to return home. And at the start of his next rotation, the Company will give him a ticket to get from home to the job.

From the dates indicated on the authorization cards submitted into evidence, it appears that the first union activity occurred in February 2001. It is noted that Fleming, a person who was, in some respects, replaced by Blackwell, had, at various times, told employees that he thought it would be a good idea if they joined a union. The parties agree that Fleming during the time that he was employed was a supervisor within the meaning of Section 2(11) of the Act.

Ms. Woodward testified that in the spring or summer of 2001, some of the employees expressed an interest in getting an official apprenticeship program. Since the Company is not affiliated with any Union, it would have to set up an apprenticeship program with the United States Department of Labor, which does have such a program for linemen. In any event, it seems that Fleming was the person delegated to look into such a program but failed to accomplish anything in that regard before he left in early October 2001. Thus, at some point in October 2001, before, the Union made its recognition demand, the Company had thought about enrolling in an apprenticeship program, but the person who was responsible had done nothing about it. After Fleming left, Woodward took over.

B. The Events Leading Up to the Election

After obtaining authorization cards from employees, the Union, in preparation for making a demand for recognition, salted the company by inducing one of its members, Walter Stephens, to leave his own job and apply for work at the Respondent. He did so and was hired on October 23, 2001 as a journeyman.

According to Stephens, when he arrived at the airport, Blackwell drove him to the job site. He testified that during

this car ride, he told Blackwell that he had a union ticket and they had some conversation as to whether union people were qualified for the type of line work done by the Respondent. Stephens testified that Blackwell said that he had belonged to the Union but that he didn't like them because all they did for him was take his money. According to Stephens, he was the one who brought up the subject of unions during this conversation.

At the risk of getting ahead of myself, I note that Stephens, by all accounts, was an excellent employee who was, in early 2002, offered a promotion to a lead person with a substantial increase in pay. This offer was made after he announced that he was a "union organizer." He quit shortly thereafter.

The Union made a written demand for recognition on October 23, 2001. This was rejected by the Company, (in writing), on October 25, 2001. Lou Woodward, testified that she had heard rumors about a union some time prior to October 23, 2001.

The General Counsel presented the testimony of Walter Stephens, Jason Collins, Jeffrey Laslovich, and Mike Muenks regarding statements allegedly made by Blackwell, Woodward and McShane during the period from October 25, 2001 to December 10, 2001. (Muenks testified only about a barbeque held on or about November 16, 2001). Their testimony was mutually corroborative at times. But at other times it was not. Some of their testimony was difficult to deal with either because they had difficulty remembering what was said, or because what they recalled was ambiguous, or they could not relate when events happened.

With respect to credibility, I note that Muenks is a union organizer whose testimony was exaggerated in my opinion. Walter Stephens, as a union plant, was also hardly a disinterested witness. Additionally I note that Collins and Laslovich were not, in my opinion, the most convincing of witnesses. On the other hand, Tracy Blackwell was not so stellar either. It was acknowledged by company witnesses that he sometimes had a tendency to shoot off his mouth.

To the extent that a chronology can be made, there is little dispute about the following:

1. On October 23, 2001, the Union made a demand for recognition
2. On October 23, 2001, union salt Walter Stephens was hired.
3. On October 25, 2001, there was a meeting held in Diboll, Texas where McShane and Woodward spoke to employees.
4. On October 26, 2001, there was a meeting held in Lake Charles, Louisiana, where McShane and Woodward spoke to employees.
5. At both meetings on October 25 and 26, Woodward stated that the Company was going to implement an apprenticeship program.
6. On November 1, 2001, the Union filed a petition for an election.
7. On November 2, 2001, two employees (Smith and Lake), who had left work earlier and claimed that they were on strike, wrote notes indicating that they wanted to return to work. (They returned on November 5 and 7, 2001).

8. On November 9, 2001, the parties entered into a stipulated election agreement.

9. On or about November 16, 2001, there was a barbeque in Jasper Texas, where union organizer Muenks was invited by Jason Collins to debate Tracy Blackwell about unionization.

10. On November 16, 2001, Jason Collins injured his back, went to the emergency room and was sent home. He was given a prescription for Vicadin and told to see his own doctor.

11. On November 16, 2001, a union official named Jason Bonner, sent in by fax, an application for a journeyman's job. The fax showed, on its face, that it came from the IBEW. There is a dispute as to whether he was ever offered a job. There is no dispute, however, that he never did work for the company.

12. On or about November 17, Blackwell is alleged to have told employees that he would give a case of beer for someone to "whip Muenks' ass."

13. About November 18 or 19 2001, there was a conference call where McShane told employees to expect ballots in the mail.

14. On November 20, 2001, the ballots were mailed to the employees.

15. On November 21, 2001, the employees were sent home for the Thanksgiving break.

16. On November 26, 2001, most of the employees returned to work. It was admitted by Blackwell that when employees returned, he asked them how they voted.

17. On November 30, 2001, Collins returned to work but at a different location.

18. On or about December 7, 2001, Stephens and Blackwell were sent home. (Although Stephens testified that he was sent home sometime between December 12 and 15, the charge in 12-CA-21946-5 alleging his layoff, was filed on December 7, 2001).

19. December 10, 2001 was the deadline for the receipt of the ballots.

20. On December 10, 2001, three employees, Laslovich, Brauning and Clay Grant, who were employed at the Jasper, Texas site, left work and claimed that they were on strike.

21. On December 10, 2001, Collins received a warning for conduct that occurred on December 7 and 8, 2001. On December 10, he left work, claiming that he was on strike.

22. On December 10, 2001, Jason Bonner had a series of conversations with Blackwell, Woodward and two office employees about going to work for the Company. At about 4:30 p.m., he was told that his employment was being put on hold.

23. On or about December 10, the Company transferred an employee named Phillips from sales to the field and offered employment to Brandon Finley.

24. On December 11, 2001 the ballots were counted.

With that chronology in mind, let's continue.

Immediately after receiving the Union's demand, the Company's president, Thomas McShane, contacted legal counsel and received a script to read to the employees. McShane and Woodward then went to the two locations where it had working crews. On October 25, they visited the crew in Diboll, Texas. On October 26 they visited the other crew in Lake Charles, Louisiana.

McShane testified that on both occasions, he read his script without deviation and that the only statements that Woodward made were to the effect that the Company was going to initiate an apprenticeship program. There is nothing in the script itself, which is alleged to violate the Act. And most of the employee witnesses called by the General Counsel acknowledged that it appeared to them that McShane was reading from some papers that he held in his hand.

The General Counsel relies on the testimony of Laslovich to support the allegation that on October 25, at Diboll, Texas, McShane made statements to the effect that selecting a union would be futile. But the testimony of Laslovich, which was not corroborated by any other employee on this point and his testimony does not support this conclusion. First of all, Laslovich had a hard time remembering what was said and had to be shown his affidavit to refresh his recollection. Moreover, after doing so, his testimony was still ambiguous. Laslovich's testimony was as follows; "He was talking about the union and he said he wasn't going to be going—he didn't want to be going union. He wasn't going to go union, and he was telling us a little information that he had to the union in Florida. He said that the Union in Florida, if they needed money, they could pull it from their members at any time."

As noted, McShane and Woodward met with the other crew in Lake Charles, Louisiana on October 26, 2001.

Collins testified that during the meeting, McShane said that "Air 2 doesn't have to accept the Union and they won't accept the Union." Notwithstanding this testimony, I believe that McShane simply read from his script, which read, in part; "But although the Union can make you promises, it's also the law that Air 2 does not have to agree to any of the Union's proposals. We have the right to say no."

Collins also testified that at the October 26 meeting, Woodward asked him if he "was for the union." This was credibly denied by Woodward.

There is, however, no dispute that at these two meetings, Woodward told the employees that the Company was going to implement an apprenticeship program. She repeated this promise later in November, before the ballots were mailed. And indeed, the Company, in late December 2001, did and implement an apprenticeship program that was registered with the U.S. Department of Labor.

According to Stephens, in late October 2001, at the Lake Charles site, the men were sitting in a restaurant when Blackwell said that he was mad at Phillips for starting "this union business." Stephens testified that Blackwell added, "he'll get his for that," or something like "he'll have his day." At that time, Phillips, who was previously an apprentice lineman, had been transferred, (promoted?), to sales. (In this context, I don't know whether Blackwell's statement about Phillips was meant to be a threat or a congratulation).

Contemporaneously with the Union's demand for recognition, two employees, James Lake and Troy Smith, who had signed union authorization cards, ceased working and claimed that they were on strike. (All of the other employees remained at work).

According to Stephens, in November 2001, at the Lake Charles site, he and some other employees were talking to

Blackwell in a hotel room when Blackwell received a phone call which he said came from either Lake or Smith who wanted to return to work. According to Stephens, Blackwell said, “they made their bed, now they was going to have to lay in it.” But Stephens adds that Blackwell then made a phone call to Woodward where he said that Lake and Smith were good workers whom he would like to have back. According to Stephens, when Blackwell got off the phone, he said that the two were going to come back, but that they were going to make them sweat a little while. Stephens testified that Blackwell opined that he thought that they would have to pull their cards, but that they had learned their lesson and he was glad to have them back.

With respect to the incident involving Lake and Smith, the record indicates that on November 2, 2001, they requested to return to work, so the phone calls described by Stephens must have taken place shortly before that.¹ There was no probative evidence to show that either Lake or Smith were asked to withdraw their union authorization cards as a condition of returning to work or that there was any delay in having them return to work. Indeed, they returned respectively on November 5 and 7, 2001. Blackwell conceded, however, that during the conversation at the hotel room, he did say that they should “sweat” before being allowed to return to work.

On or about November 16, there was a barbeque for the employees in Jasper, Texas. This was held at the house of Paul Rupert who is a pilot for the Company.

At this barbeque, union organizer Michael Muenks showed up, apparently at the request of employee Jason Collins.² According to Muenks, he told the employees why they should have a union and that he and Blackwell got into a heated argument. According to Muenks, Blackwell said that the company was thinking about closing its doors and going out of business because of this. Muenks testified that Blackwell asked if the Union was going to provide the employees with travel expenses, to which he replied that this was a negotiable item. Muenks states that Blackwell said that the Company’s pilots would refuse to fly with IBEW linemen and that they didn’t want to have to train people. According to Muenks, Blackwell said that the employees were not interested and asked why the Union was trying to run this company out of business. At one point, according to Muenks, he said in response to Blackwell’s assertion that the employees didn’t want a union, that Blackwell should ask them, whereupon Blackwell pointed to each person and asked if they were for the Union.

Stephens testified about this “debate” between Muenks and Blackwell at the barbeque. According to Stephens, when Muenks tried to make some pleasantries, Blackwell crossed his arms, turned red faced and told him that he, (Muenks), had “fed them apprentices to the wolves and the Union didn’t do nothing for apprentices and didn’t do nothing for him.” According to

Stephens, Blackwell said that the Union would never be able to get in because he had pilots who refused to fly with union linemen and that the pilots can refuse to fly with anybody. Stephens states that Blackwell said that the Union was no good, that all it ever did for him was to take money out of his check, and that he didn’t understand why they were there because nobody wanted the Union. According to Stephens, Blackwell then asked each of the apprentices if they wanted a union apprenticeship. Stephens did not testify, however, that Blackwell made any statements about going out of business or closing doors.

Jason Collins’ recollection of the barbeque is a little different from the version by Stephens and Muenks. According to Collins, Muenks introduced himself and Blackwell said that if the Union came in “we’d all lose our benefits; we’d lose everything.” Collins testified that Blackwell said that the Union wouldn’t be good for us and then asked everybody how they felt about the Union. Collins states that the men said that they were for the Union and that when Blackwell asked him directly, he told Blackwell that he was for it. According to Collins, Blackwell said that his pilots wouldn’t fly if they went union and that he said it was all a bunch of bullshit, whereupon he walked out and said he was going to bed.

Jeffrey Laslovich testified about the barbeque but was not too good at remembering what was said. He testified that Blackwell asked Muenks why he was trying to bring Air 2 down and “make us all lose wages” to which Muenks said he was not trying to bring the Company down; that he was trying to help the Company. Laslovich recalls Muenks saying that Blackwell was saying illegal stuff and that Blackwell responded that he didn’t know anything about the legal stuff. According to Laslovich, Blackwell asked the employees how they were all voting, and that he recalled Jason Collins responding to the effect that he wanted an apprenticeship program.

Blackwell testified that Muenks showed up at the barbeque and that they had a heated argument about the Union. He states that he made no threats and that after giving his opinion, he got up and walked away.

Stephens testified that on the following day, (November 17), he was riding with Blackwell and he said in a joking manner, “I thought you were going to choke Mike Muenks.” According to Stephens, Blackwell said that he was almost going to. Stephens testified that Blackwell said that he couldn’t believe how much Collins was hanging around Muenks all the time.

There was corroborated testimony that one or two days after the barbeque, Blackwell told some of the employees at the Jasper site, that he would give a case of beer for someone to “whip Muenks’ ass.” In this regard, Blackwell testified that Muenks showed up near the work site and that he, (Blackwell), told Lucas Mezner, an employee of another contractor, that Muenks was distracting the men and that he would give a case of beer if somebody would get him out of here.

Blackwell admitted that at some point in November, he told the crew that they no longer could wear short sleeved shirts and that they would have remove all insignia from their helmets, including union insignia. (Stephens places this in December). With respect to the shirts, there was testimony from both sides that the use of short-sleeved shirts presents a safety issue be-

¹ Stephens mistakenly placed these calls in late November or early December.

² According to Stephens, Muenks came to Jasper and stayed at the same hotel that the crew was staying. He also testified that Jason invited Muenks to come to the barbeque and talk to the men about the Union.

cause of the possibility of getting splinters. Some of the employees testified that they learned at lineman school that they were supposed to use long sleeved shirts while at work. With respect to the insignia, Blackwell concedes that he told the employees to remove insignia from their flight helmets when he saw that some of the employees had attached union insignia to them.

Stephens testified that sometime in the middle of November 2001, Woodward and McShane held a telephone conference call with the men at Jasper, Texas. According to Stephens, they told the employees that they would be getting ballots in the mail when they went home for Thanksgiving. Stephens testified that someone asked what was going to happen if the election went through and that Woodward said that if the Union won, everybody would be union. He also testified that McShane said that the Union couldn't really force nothing down their throat; that the only recourse the Union had was to go on strike; that even if an employee voted against the union, he would have to go honor the picket line or he would be fined by the Union.

With respect to the conference call, McShane and Woodward acknowledge that they made this call just before the employees left for the Thanksgiving holiday and that they told them that they would be getting ballots in the mail. They credibly denied the assertions made by Stephens, which by the way, were not corroborated by anyone else.

The men left their respective job sites to go home for the Thanksgiving vacation and did not return until November 26. (As noted below, Collins did not return to work until November 30). They all received their ballots at their homes.

Blackwell conceded that when employees returned to work in Jasper, he asked them how they voted. In this regard, Laslovitch testified that when Blackwell asked, he told Blackwell that he voted for the Union and that Blackwell said that it was a long bus ride home to Anaconda, Wyoming. According to Laslovitch, he laughed at Blackwell and responded that it would be fun to take a long bus ride.

Laslovich also testified that at some unspecified time, he asked Blackwell what would happen if the Union won the election and that Blackwell responded that the Company would probably close and reopen under a new name. Laslovich states that he asked Blackwell if the employees would still have jobs and Blackwell said that they he didn't know. This was credibly denied by Blackwell.

Laslovich testified that before the barbeque, Blackwell pulled him aside and asked how him everybody was going to vote. According to Laslovich, he said that he had voted no whereupon Blackwell said that this was good news. The problem with this testimony is that the ballots didn't go out until after the barbeque, so I can either assume that Laslovich is making this up or is seriously confused about events.

In addition to the above, Laslovich, after being shown his affidavit to refresh his recollection, testified that on some unspecified date, Blackwell said that Muenks had called him to say that someone was filing charges against him and that he, (Blackwell), wanted to know who was filing charges against him at the National Labor Relations Board. I don't credit this.

Stephens testified that on same unknown date before Thanksgiving, he told Blackwell that he had heard that they "was going to lay everybody off if it went through and start over." According to Stephens, he asked Blackwell if they would do that, and that although Blackwell said he didn't know, he also said that the Company could lay everybody off if they wanted to. The General Counsel alleges that this was a threat. But, even if I credited Stephens' version, (which I don't), it seems likely that this conversation, which was prompted by Stephens, was designed to get Blackwell to express an opinion which was his own and not the Respondent's. (This looks to me like Stephens was asking Blackwell a leading question designed to get him to make an illegal statement).

Stephens further testified that about two days after returning to work after the Thanksgiving holiday, Blackwell came up to his room and asked how he voted. According to Stephens, he responded that he hadn't voted yet and Blackwell said he had to circle "no" and send the ballot in. Stephens testified that Blackwell told him that he had a good future at the Company, that everyone liked his work and that if the Union goes through, "it would really goof us up on our wages and benefits and everything else."

C. Jason Collins

Collins, an apprentice lineman, was the person who invited Muenks to attend the pre-Thanksgiving barbeque. He also asserts that at some other time, (indeterminate), he had a conversation with Woodward when she came to the site and she asked him why he wanted the Union. Collins states that he defended the Union and said that he thought that with the union, the employees would get a really good training program.

Collins also testified that at some indeterminate date, he had a conversation with Blackwell at a bar in Jasper where Blackwell said that he knew that Collins was going to make the right decision "come voting time." According to Collins, Blackwell said either that we would or he would lose everything if it goes union and that he, (Blackwell), heard that Collins was the one who was going to testify against him at the Labor Board. This was not corroborated by anyone and was credibly denied by Blackwell.

In any event, and whether or not one credits Collins testimony regarding the alleged statements by Woodward or Blackwell, the evidence shows that by November 16, 2001, the Company was aware that Collins was a union supporter.

On November 16, 2001, Collins complained of a back injury and was taken to the hospital. At the emergency room he was given a shot of Demerol and left with a prescription for Vicadin and the suggestion that he see his own doctor. In the morning, Woodward called Collins and told him that she had a ticket for him for a flight to his home in Oregon that evening. According to Collins he told her that he wanted to work and asked her why she was sending him home. He states that she said that they couldn't afford having someone with a back injury on the job. (Since Vicadin is a narcotic based drug, which can cause

drowsiness and disorientation, it would have been the height of folly to allow Collins to continue to work as a lineman).³

On November 20, 2001, the ballots were mailed out to the employees' homes.

On November 21, 2001, the employees were all sent home for the Thanksgiving break. This lasted until November 26, 2001 when the employees returned to work.

On November 21, 2001, Collins went to a doctor in his home town and got a note stating that he could return to regular work, (without restrictions), on November 26, 2001. He faxed this note to the Company on the same date.

According to Collins, on or about November 23 or 24, he received a call from Woodward who told him that she hadn't gotten him a regular flight back to the job and that she would get back to him when the office could arrange for another flight. Collins testified that she also said that she would need another doctor's note before returning.

Collins testified that around November 26 or 27, he had a conference call with Woodward and McShane. He states that they told him that they had a flight for him but that instead of going back to Jasper, Texas, he would be going to the other crew in Louisiana. According to Collins, McShane said that the reason was that they didn't want him stirring up any more trouble. Collins asserts that Woodward said that Collins was spending most of his time with the Union guy. He states that he asked Woodward where she heard this, and that she responded that it was from someone outside the company and that "it's a small world."

Woodward and McShane credibly denied that they made the statements attributed to them by Collins. According to McShane, there was a conference call with Collins after he was injured and that he just asked Collins if he was confident that he was ready to return to work. They deny that Collins's union activities had anything to do with his transfer to Louisiana.

Collins returned to work on November 30, 2001 and worked on the crew headed up by J.P. Flynn in Lafayette, Louisiana. When he arrived, he was told that he could not longer wear short sleeve shirts and that he had to remove any insignia from his helmet.

On December 10, 2001, Collins received a warning. The warning was based on three incidents that occurred on December 7 and 8. The warning stated that it was given because Collins left a safety meeting to make a personnel telephone call; that he threatened another employee; and that he drove a vehicle in an unsafe manner. Collins did not deny that engaged in the conduct alleged and specifically admits that he threatened to punch another employee. And in the latter regard, Collins acknowledges that he wasn't kidding when he made the threat. Collins testified that Woodward told him that any more occurrences would result in his discharge.

D. Walt Stephens

As previously noted, Stephens was persuaded by the Union to leave his existing job in order to apply for work at the Respondent. He did so and was hired as a journeyman. Upon his

arrival at the airport on October 23, 2001, he told Blackwell that he had a union ticket and engaged Blackwell in a discussion about unions. Blackwell's response was that the only thing a union ever did for him was to take money out of his paycheck.

From October 23, 2001 to December 7, 2001 and with the exception of the Thanksgiving break, (November 21 to 26), Stephens worked every day.

According to Stephens, in early December 2001, he told Marty Lyons, (the other leadman), that he was a union organizer and put a union sticker on his flight helmet. Stephens testified that he handed out union t-shirts and insignia to the other employees and that when Blackwell came back from a recruiting trip in Georgia, Blackwell told the employees that they had to remove the insignia from their flight helmets and that they would have to wear long sleeve shirts.

On or about December 7 or 8, the Company sent both Stephens and Blackwell home from their work site in Jasper, Texas. This was consistent with its policy of rotating employees back home after extended periods at work in order to give them a break from what is, after all, a very dangerous job. Normally, the rotation lasts for about 10 days and by this time, there was only 15 days left before the Christmas break.

According to Stephens, when he asked Lyons if he was being fired, he was told that he was not and that he should talk to Woodward. Stephens states that he called Woodward who told him that the job didn't require him there and since he was the last guy hired, she was going to send him home. He states that when he asked about coming back, Woodward was noncommittal and said that she would have to look at the numbers.

On December 10, after Stephens and Blackwell were sent home, three of the apprentices who were working at Jasper left work, asserting that they were on strike. Thereafter, the Company transferred Phillips to Jasper on December 11 and hired Brandon Finley for that job site on December 13. That left, at Jasper, a net reduction of one employee for the remaining time before the Christmas break. (The employees went home on December 22).

After being sent home, Stephens went to work for another contractor and wasn't home when Woodward tried to call him about coming back to work.

On December 18, 2001, Woodward, some time after being told by Lyons that Stephens was a union plant, sent a letter to him at his home which stated that she had been trying to reach him about his next assignment. In the letter, she asked that he call her on December 21 because the Company had work scheduled which she wanted him to do if he was available. Stephens didn't get the letter because he had taken another job and was away from home. Therefore, he did not manage to contact Woodward until some time later in December. When he finally did, Woodward told him that he could report on Monday, January 6, 2002 to a new job in Beaumont, Texas.

Stephens arrived in Beaumont on January 6, 2002 and then worked for 22 consecutive days until January 27, 2002 when he was sent home again on rotation. He returned on February 8 and worked through the beginning of March 2002 when he announced that he was going on strike and left.

³ For a description of Vicadin, one can go the web site of the National Institute of Health and use its search function. www.NIH.gov.

The evidence shows that Company considered Stephens to be an excellent employee. And in this regard, Woodward, in late February, 2002, offered to promote him to a leadman with a sizeable increase in pay. Although initially indicating that he would accept the promotion, Stephens decided instead to leave in early March 2002.⁴

The General Counsel also contends that in December 2001, the Company ordered jackets for its employees and failed to order one for Stephens. In this regard, the evidence indicates that Woodward ordered, from Land's End, 15 jackets with company logos. These were given out to those employees who were still at work up to the Christmas break. At that time, Stephens had been sent home and had gotten another job. When he did return to work on January 6, 2002, he was not given a jacket and Woodward testified that this was because she discovered that he was a size "extra large," and she didn't have that size available. So she ordered some more jackets for Stephens and some other new people who had been hired. Ultimately he got his jacket and in my opinion, the General Counsel has not proven that the Employer violated the Act in this respect.

E. Jason Bonner

The complaint alleges that the Respondent, on or about December 10, 2001, illegally withdrew a previously made offer of employment. Curiously, it does not allege that the Company unlawfully refused to hire Bonner or refused to consider him for employment.⁵ In response, the Company simply asserts that no authorized person ever offered Bonner a job. It did not explain why it didn't offer him a job, although several possible reasons could be inferred from the circumstances.

Bonner is employed by the IBEW as a union agent. Bonner testified that in November 2001, he spoke to someone in the Company's office named Lynn about a job and was referred to Tracy Blackwell. He states that he called Blackwell who said that if Bonner was interested, he should send in an application.

On November 16, 2001, Bonner sent in a job application by fax. This fax indicated on the top, the sender's telephone number and specifically noted that it originated from the IBEW. Woodward testified that when she received this fax, she noticed that it came from the IBEW and decided that Blackwell should go ahead anyway and interview Bonner for a job.

According to Bonner, he had a series of conversations with Blackwell, Woodward, Lynn and another office person regarding employment. And from what I can determine, all of these took place during the course of one day; December 10, 2001.

Bonner testified that Blackwell called and asked if he was still interested in working and that he told Blackwell that he was. According to Bonner, Blackwell asked if he was a union member, to which he replied that he was and asked if this was going to be a problem. At this point, according to Bonner, Blackwell said that they were having some problems with a union that was trying to force themselves on the Company and that he, (Blackwell), had inadvertently hired a union plant.

According to Bonner, Blackwell said "it was a f...ing nightmare." Bonner states that Blackwell said that if he took the job, he was going to be considered a nonunion hand and asked if Bonner had ever done any aerial work. After Bonner stated that he had just finished a job in New York with two helicopters, Blackwell said that the Company would supply the flight helmet and tools; that the pay would be \$25 per hour with a \$35 per day per diem; and that the Company also paid for hotel rooms. Bonner testified that Blackwell said that there was a good chance that Bonner would be hired and that he would have to speak to the vice president, (Woodward). According to Bonner, Blackwell asked him how soon he could start.

According to Bonner, he received another phone call from Blackwell telling him that he would be brought down on a trial basis and that he would probably work until the Christmas holiday and if he liked the company, and the company liked him, there would be a long term project.

Bonner testified that the next phone call he got was from Woodward who asked him a few things and also spoke about the problem they were having with the Union. He states that she asked if Blackwell had gone over the wages and said that he would be brought down to Jasper, Texas on a trial basis until the Christmas holiday. According to Bonner, "it sounded optimistic" that he would be employed by Air 2 by the end of the day.

Bonner testified that the next phone call came from Lynn to start the process of getting his paper work done. He states that she told him they could arrange for an immediate flight from Pennsylvania, at which point he told her that he couldn't leave until December 13 or 14.

Somewhat later, Bonner states that he received a phone call from Sue Chetwood about payroll stuff and then another call from Lynn who said that she had a problem getting him a flight out of Wilkes Barre, but that she could arrange a flight from Allentown or Newark.

According to Bonner, at about 4:30 p.m., he received a final call from Blackwell who said that his employment status had been put on hold and that he would not be starting until after the first of they year. Bonner states that he didn't bother asking why because he figured that he knew the reason.

By the time that Bonner had this last conversation, I presume that the votes had been counted and that four apprentices, Laslovich, Grant, Collins and Brauning, had left the job and declared that they were on strike.⁶

It is noted that the employees left for the Christmas vacation on December 22 and the new job started on January 6, 2002. Thus, had Bonner started on December 13 or 14, he would only have worked a week before being sent home.

It seems that no one from the Company contacted Bonner after December 10 and he did not attempt to contact the Company until the end of January 2002. Bonner states that in late January, he called the Company and after leaving the Union's phone number, got a call from Woodward who said that the work

⁴ Although not entirely clear it appears that Stephens was directed by the Union to leave.

⁵ The Union takes a broader position which is that the Company refused to hire Bonner for discriminatory reasons.

⁶ The Board reiterated in *Aztech Electric Co.*, 335 NLRB No. 25, (2001), that an employer is entitled to refuse to hire a paid union agent during the course of an economic strike. See *Sunland Construction Co.*, 309 NLRB 1224, 1231 (1992).

picture had dropped off; that they currently had two crews that were fully loaded up; that she was trying to drum up some more business; and that if they got a third crew going, there was a possibility of employment.

III. ELIGIBILITY AND BALLOT ISSUES

The Union challenged the ballot of Tracey Blackwell on the grounds that he was a supervisor as defined in the Act. I have already discussed this issue and concluded that he did have authority set forth in Section 2(11) of the Act. Therefore, I conclude that the challenge to his ballot be sustained and that it remained closed.

The Employer objected to the fact that the Board agent conducting the election voided the ballot of Marty Lyons.

The election was conducted by mail ballot, no doubt because the employees worked in the field, far away from any centralized location. In this respect, the employees were mailed a package containing the ballot, a blue envelope to place the ballot, and a yellow return envelope, addressed to the Board's office. The point was for the employees to mark their ballots, seal them inside the blue envelope and then return them inside the return yellow envelope. The return envelope is supposed to contain the employee's signature. At the count, the return envelopes are examined and if any party wishes to make a challenge, he can do so at this point. In the absence of a challenge, the blue envelopes are removed and when aggregated, the ballots are removed and counted so that the persons marking the ballots cannot be identified.

In Lyon's case, he marked his ballot and put it inside the outer yellow envelope without using the blue envelope. This meant that upon opening the envelope containing his signature there was the possibility that the parties would see how he voted. Therefore, the secrecy of his ballot could be negated. There is a paucity of recent case law dealing with this type of situation. However, the Board's decision in *Northwest Packing Co.*, 65 NLRB 890, 891, and (1946) would seem to apply. That case involved a very similar circumstance where an employee placed his ballot into the return envelope without first placing it in the blue envelope. There, the Board overruled the Regional Director and held that the ballot was void. Accordingly I shall conclude that Lyon's ballot be declared void.

The Employer objected to the Board agent's decision to count the ballot of Jeff Laslovich. In this situation, Laslovich followed the instructions in the sense that after he initially placed his ballot directly into the yellow return envelope, he realized that he had made a mistake, opened the envelope, put his ballot in the blue envelope and then resealed the yellow envelope with the blue envelope inside. There is, my opinion, nothing nefarious about this transaction and I recommend that the Employer's objections in this regard be overruled.

IV ANALYSIS

A. The Apprenticeship Program

Faced with a union organizing campaign, and particularly with an election petition filed with the NLRB, an Company may find itself in a quandary regarding decisions to promise, grant, or withhold benefits. In the present case, one issue re-

volves around the promise of and promulgation of an apprenticeship program.

The evidence establishes that the Company was aware that the new employees were interested in getting an apprenticeship program. And the evidence also shows that in the spring and summer of 2001, *before management was aware of any union activity*, the Company assigned Fleming to look into the possibility of getting such a program. (Obviously, since the Company was nonunion, it couldn't enroll in a union sponsored apprenticeship program and would have to sign up with a program approved by the United States Department of Labor).

For better or worse, Fleming, who also urged employees to join a union, didn't follow through on this project. And by the time that the Company became aware that the Union was organizing its employees, Fleming hadn't done anything about obtaining an apprenticeship program.

When the Union made its demand for recognition on October 23, 2001, the Company, at the meetings on October 25 and 26, 2001, told the employees that it was going to get an apprenticeship program so that its apprentices could ultimately obtain certification as journeymen linemen. Ms. Woodward told employees that since the Company was not unionized, if employees were intent on getting into a union apprenticeship program, they would have to get jobs in unionized companies and could always return to Air 2. (I don't consider that to be a threat as it is simply a statement of fact).

Sometime later in November, 2001, the Company repeated to the employees that it was going to institute an apprenticeship program. And sometime in December, 2001, it did institute a Department of Labor authorized program.

An employer who promises or grants benefits while an election petition is pending will be held to violate the Act unless it meets its burden of proof by showing that the increases either had been planned prior to the Union's advent on the scene or that they were part of some established past practice. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1963); *Baltimore Catering Co.*, 148 NLRB 970 (1964). Further, where the announcement of a benefit is timed so as to influence the outcome of an election, the Board may find a violation of the Act even where the benefit had previously been planned. In *NLRB v. Pan-del-Bradford* 520 F.2d. 275 (1st Cir., 1975), the court stated:

The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally. Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice. [Citations omitted].

In *Mountaineer Petroleum*, 301 NLRB 801 (1991), the Board stated:

The validity of wage increases or other benefits during the pendency of representation petitions turns upon whether they are granted "for the purpose of inducing employees to vote against the union." ... Under settled Board policy, a grant or promise of benefits during the critical pre-election period will

be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action.

In the present case, the evidence shows that the Employer's management had merely thought about getting an apprenticeship program *before* it became aware that the Union was organizing its employees. But the evidence also shows that person responsible for following through, failed to do so. In this regard, the evidence shows that the Company made a decision to implement an apprenticeship program only *after* it became aware of the Union's organizational campaign and announced this decision to the employees only after the Union made its demand for recognition. Further, this promise was repeated after the Union had filed its petition and so the promise was reiterated at a time when it was obvious that an election was going to be held.

Based on the foregoing, I would conclude that by promising an apprenticeship program in the circumstances described above, the Employer violated Section 8(a) (1) of the Act.⁷ I also would conclude that inasmuch as this promise was reiterated during the critical period, between the time that the petition was filed and the time that the election was held, that the Union's objections based on this conduct should be sustained. Moreover, I would conclude, based on this conduct alone, that it had a sufficient impact on the election so as to warrant that it be set aside.

B. The 8(a)(3) Allegations

Pursuant to *Wright Line* 251 NLRB 1083, (1980) enf. 622 F.2d. 899 (1st Cir. 1981), cert. denied 495 U.S. 989, (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), once the General Counsel has established a *prima facie* showing of unlawful motivation, the burden is shifted to the Respondent to establish that it would have laid off or discharged the employees for good cause despite their union or protected activities.

In *American Gardens Management Co.*, 338 NLRB No. 76, (2002), the Board noted that under *Wright Line*, the General Counsel is required to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the Employer's decision and if such a showing is made, the burden shifts whereupon the Employer is required to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board further stated that in order to meet the initial burden, the General Counsel must establish four elements; (1) the existence of activity protected by the Act; (2) the Employer's knowledge of that activity; (3) the imposition of some adverse employment action; and (4) the existence of a motivational link, or nexus, between the protected activity and the adverse employment action.

⁷ The dilemma for the Employer and its counsel was that if the Company had clearly made and announced a plan to get an apprenticeship program before the Union began organizing, it might have violated the Act if it had withheld its implementation because of the pending election.

1. Jason Collins

The General Counsel alleges that the Respondent required Jason Collins to get another doctor's note before returning to work after an injury. It also is alleged that the Respondent violated the Act by transferring Collins to a different location after returning to work. Further it is alleged that a disciplinary warning given to him was discriminatorily motivated. I reject all of these contentions.

Collins injured his back while at work and went to the local hospital's emergency room on November 16, 2001. While there, the attending doctor told Collins to see his own doctor and gave him a prescription for Vicadin, a narcotic based medication whose side effects may include drowsiness and disorientation. Although insisting that he was ready to go back to work, Woodward wisely gave Collins a first class air ticket and ordered him to return home.

Given the injury and the prescribed medication, it would have been reckless for the Company to allow Collins to return to a job, which was inherently dangerous. Because Collins' job required him to balance himself between a helicopter and a tower, the affects of his medication could have resulted in his demise.

On November 21, 2001, Collins went to a doctor and obtained a note stating that he could return to regular work, (without restrictions), on November 26, 2001. This was during the time when all of the other employees had also been sent home for the Thanksgiving break.

Collins returned to work on November 30, 2001, about four days after the other employees returned from the Thanksgiving break. And although it is asserted that he was transferred to another location because of his union activity, I don't think that the General Counsel has proven this assertion and I do not credit Collins' testimony that he was told by Woodward or McShane, during a conference call, that he was stirring up trouble or that he was spending most of his time with the Union guy.

With respect to the warning given to Collins after his return to work, there was no denial by him that he engaged in the conduct that gave rise to the warning. That is, Collins admits that he seriously threatened to punch another employee and he did not deny the other factors leading up to the warning. The General Counsel contends that rough language and threats of a similar nature are common and tolerated among this group of employees. It may be that these employees are more boisterous than usual, but the fact is that the warning to Collins was, in my opinion, a particularly light form of punishment for the acts committed.

2. Walter Stephens

The complaint alleges that Walt Stephens was sent home prematurely on or about December 7, 2001.

However, the fact is that the Respondent has a policy of rotating its employees back home usually after 20 consecutive days of work. In this instance, Stephens, except for the Thanksgiving break, had worked well in excess of the usual period and he was sent home at the same time as Blackwell. And at the time he was sent home, there was only two weeks

left before the Christmas break when work stopped for everyone.

When he got home, Stephens got himself another job and was unavailable when Woodward called to tell him about his next assignment. After Woodward sent him a letter on December 21, 2001, Stephens finally returned her calls and was asked if he would return to work on January 6, 2002.

Despite being aware that Stephens was a union plant, the Company, in February 2002, decided to give him a promotion to crew chief with a substantial increase in pay. He accepted this job, but ultimately left after his next rotation home.

In my opinion, the credited evidence does not demonstrate that the Company discriminated against Stephens in any manner. The evidence, in my opinion, shows that on December 7, the Company followed its normal practice of rotating employees home after an extended period of time and the fact is that both Stephens and Blackwell were sent home at the same time. Even if the Company had wanted to recall Stephens before the Christmas break, this was not possible because Stephens had left his home to had take another job.

Nor do I conclude that the Company discriminated against Stephens by failing to give him one of the newly purchased company jackets. When Woodward realized that she did not have the right size for him, she ordered new jackets including one for Stephens.

3. Jason Bonner

The General Counsel contends that the Respondent retracted an offer of employment that had been made to Bonner. The Union takes a broader position, which is that the Respondent refused to hire him for discriminatory reasons.⁸ The Company, because of the way that the complaint was phrased, was content to offer evidence only to contest the allegation that an offer of employment was never made to Bonner. Otherwise, the Company made no explanation as to why it did not make an offer of employment to Bonner.

Bonner is a paid agent of the IBEW. The application he sent to the Company was faxed from the Union's office and indicates this on the top right hand corner of the document. Thus, an observant person would have noticed that the job application had originated from the IBEW. Woodward testified that she saw that this was the case when she reviewed his application.

On December 10, after the ballots were counted, and after three of the employees announced that they were going on strike, Woodward decided to have Blackwell call Bonner about employment. There then ensued a series of conversations between Bonner, Blackwell, Woodward and the two office women. Without repeating the testimony, the bottom line is that according to Bonner, before finally being told by Blackwell that Woodward had put his employment situation on hold, he had gotten the impression from Blackwell and the two office workers that the Company was going to hire him, at least on a

temporary basis. Nevertheless, Bonner's own testimony supports Woodward's contention that there never was any explicit offer made to him. Thus, although Bonner testified that Blackwell told him that he *would* be brought down to Jasper on a trial basis, he also testified that by the end of this conversation, it sounded optimistic that he would be employed by the end of the day.

The facts here are peculiar. At the time that these conversations took place, it is likely that the Company was aware that Bonner was a paid union agent but nevertheless undertook to talk to him about employment anyway. This all occurred on December 10, the same day that four of the unit employees suddenly announced that they were going on strike. I also note that Bonner, during the course of these conversations, said that he could not leave immediately and would not be available until December 13 or 14.

Given this set of facts, it would not be totally implausible to conclude that a reason for failing to offer Bonner a job was because of his union affiliation. But there would also be other more plausible reasons, which however, were not articulated by the Respondent. One might be that any possibility of a job offer was withdrawn when it became apparent that Bonner was not immediately available for work. Another might be that during the day, the Respondent discovered that it could transfer Phillips from sales to the field and hire another employee, Brandon Finley, at a little more than half the wages of Bonner, to do what was necessary to complete the Jasper job. A third alternative reason would be that where some of its employees announced that they were on strike, there was a high probability that even if hired, Bonner would refuse to work. (Thus causing the Company to expend money for airline tickets and hotel expenses for a man who might also go on strike as soon as he arrived at the job site).

Given all of these peculiar circumstances, I do not think that the General Counsel has met his *prima facie* burden of proving that the Respondent has discriminated against Bonner.

C. Miscellaneous 8(a)(1) Allegations

I have, in the body of this Decision, made a number of credibility findings as to statements allegedly made by McShane, Woodward and Blackwell. Apart from the promise of the apprenticeship program, which is discussed above, I have concluded that Woodward and McShane did not make any other statements which could be construed as violations of the Act. In this regard, the evidence shows McShane read from a prepared script to employees on October 25 and 26, 2001 and that the remarks he made were permitted by the Act. The credited evidence further establishes that shortly before Thanksgiving, they conducted a conference call with employees to advise them that they would be receiving mail ballots.

On the other hand, I conclude that Tracey Blackwell did make some statements which violated Section 8(a)(1) of the Act. In this regard, the Company asserts that Blackwell merely stated his own opinions and that he was never authorized to speak on its behalf regarding the Union campaign. Nevertheless, I have concluded that Blackwell was a supervisor as defined in the Act and therefore that the Company is liable for any illegal statements he made. Moreover, even if his supervi-

⁸ In note however, that the General Counsel is the only party who is permitted to control the allegations of the complaint and the Charging Party cannot amend a complaint on its own, even though it may offer a different theory of violation or proffer remedies other than those proposed by the General Counsel to remedy a violation of a complaint allegation. *Kaumagraph Corp.*, 313 NLRB 624, 625 (1993).

sory status was viewed as being uncertain by the Employer at the time of the election campaign, the Company could have explicitly told the employees that Blackwell did not speak for the Company.⁹

In any event, I conclude that the Respondent violated the Act only with respect to the following statements or conduct by Blackwell:

Blackwell ordered the employees to remove union insignia from their flight helmets. *Sears Roebuck and Co.*, 305 NLRB 193 (1991).

Blackwell interrogated employees about how they voted in the election when they returned to work on November 26, 2001.

Blackwell made an implied threat to an employee when, in conjunction with being told that the employee voted for the Union, stated that it was a long bus ride back to Anaconda.

Blackwell threatened employees by inviting the assault on a union organizer.

Blackwell impliedly threatened employees by stating that the Company would make Lake and Smith sweat before allowing them to return to work. (I think this constitutes a threat even though these two employees returned to work soon after they offered to go back).

With respect to barbeque, I think the testimony was confused. From what I can determine, Muenks was invited by employee Jason Collins to come and argue with Blackwell and this is what happened. It seems that Blackwell accused Muenks of trying to destroy the Company, which Muenks denied. Blackwell expressed his opinion that a union would only cost employees money; that the pilots employed by the Company did not want to have to train union linemen and would refuse to fly with them; and that the employees did not want a union. At some point, Muenks asked Blackwell how he knew the employees didn't want a union and suggested that Blackwell ask them. Blackwell did and got a response. This can hardly be viewed as coercive interrogation inasmuch as it was prompted by the Union's agent. On the other hand, I credit the testimony that Blackwell made a statement to the effect that that the Company's pilots would refuse to fly with or train union linemen. This, in my opinion, could be viewed as a threat of reprisal and in this regard, I find that the Respondent violated Section 8(a)(1) of the Act. Cf. *Wake Electric Membership Corp.*, 338 NLRB No. 32 slip opinion at 2 (2002).

D. Is a Bargaining Order Appropriate ?

In *Aiello Dairy Farms Co.*, 110 NLRB 1365 the Board held that if a union participated in an election after the Employer had refused its request for recognition, it waived a bargaining order remedy. Under that case, if unlawful conduct was committed before an election, the Union's sole remedy was to have the election set aside and have a new election conducted. However, the *Aiello* decision was overruled in 1964 by *Bernel Foam Prods Co.*, 146 NLRB 1277 and the Board reverted to its pre-1954 doctrine. The Board stated:

[T]he so-called "choice" which the union is forced to make under *Aiello* between going to an election or filing an 8(a) (5) charge is at best a Hobson's choice. Although an election is a relatively swift and inexpensive way for the union to put the force of law behind its majority status, the procedure is highly uncertain entailing the real possibility that because of conduct by the employer no fair election will be held.

....

Since this difficult and rather dubious "choice" is created by the employer's unlawful conduct, there is no warrant for imposing upon the union which represents the employees, an irrevocable option as to the method it will pursue... while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct.

The rule that a union does not waive any rights to a bargaining order because it proceeded to an election, was confirmed by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In that decision, the Court decided four separate cases and enforced a bargaining order where a union, initially having obtained authorization cards from a majority of the employees, had lost an election in which the Employer's conduct had invalidated the election.

In *NLRB v. Gissel Packing Co.*, supra, the Supreme Court distinguished between three categories insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involved "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be appropriate to remedy unlawful conduct which had the effect of making a fair election unlikely where, at some point, the Union had majority support. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

Where an election has been conducted, the Board has held that a precondition to the granting of a bargaining order is that the election must be set aside because of conduct interfering with the conduct of the election. *Irving Air Chute Co., Marathon Division*, 149 NLRB 627 (1964); *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977).

Had the General Counsel prevailed on all or most of the allegations alleged, there would be no question that a bargaining order would be appropriate.

But what we have here is an unlawful promise of benefit, (the apprenticeship program), and a few coercive statements by Tracey Blackwell who is a borderline supervisor. These, to my mind, are not the kind of "hallmark" violations that the Board or the Courts have described in cases such as *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212, (2nd Cir. 1980), *National Pro-*

⁹ It might also have suggested to Blackwell that because of his position in the field, it did not want him to make any anti union statements.

pane Partners, L.P., 337 NLRB 1006 (2002) or *Parts Depot Inc.*, 332 NLRB 670 (2000).

Accordingly, I would not recommend that a bargaining order be granted on the basis of the facts in this case. *Wake Electric Membership Corp.* 338 NLRB No. 32 (2002).

CONCLUSION OF LAW

The Respondent, Air 2, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

1. The Union, International Brotherhood of Electrical Workers, Local 222, is a labor organization within the meaning of Section 2(5) of the Act.

2. By promising an apprenticeship program to employees in an effort to dissuade them from voting for the Union, the Respondent has violated Section 8(a) (1) of the Act.

3. By ordering employees to remove union insignia from their flight helmets, the Respondent has violated Section 8(a) (1) of the Act.

4. By interrogating employees about how they voted in the election, the Respondent has violated Section 8(a) (1) of the Act.

5. By implicitly threatening to lay off or discharge employees if they voted for the Union, the Respondent has violated Section 8(a) (1) of the Act.

6. By threatening to assault a union organizer in the presence of employees, the Respondent has violated Section 8(a) (1) of the Act.

7. By telling employees that the Company's pilots would refuse to fly with union linemen, the Respondent has violated Section 8(a) (1) of the Act.

8. Except as otherwise found herein, the Respondent has not violated the Act in any other manner encompassed by the complaint.

9. To the extent that these violations are coextensive with certain of the Union's objections to the Election, the objections are sustained and the election should be set aside.

10. The challenge to the ballot of Tracy Blackwell is sustained.

11. The ballot of Marty Lyons is invalid should remain closed and uncounted.

12. The ballot of Jeff Laslovich should be opened and counted.

13. Pursuant to the stipulation of the parties, the ballots of John Flynn, Jason Collins and James Lake should remain unopened and uncounted.

14. A new tally of ballots should be prepared and depending on the outcome of the election, an appropriate Certification should be issued. In this regard, it is assumed that if the outcome shows that a majority of the valid votes counted is in favor of union representation, the Union would obviously withdraw its objections in favor of a Certification of Representative. On the other hand, if the revised tally shows that a majority of the valid votes counted was against unionization, then a new election should be conducted based on the Union's objections.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the apprenticeship program, I shall not recommend that the Respondent be ordered to rescind this program, as this would compound the effects of the unfair labor practices.

With respect to the election, I recommend that a revised tally of ballots be issued after counting the ballot to be opened. In the event that a majority of the votes are cast for the Union, it is recommended that a Certification of Representative be issued to it. In the event, however, that a majority is cast against union representation, it is recommended that a new election be held.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended¹⁰

ORDER

The Respondent, Air 2, LLC, its officers, agents and assigns, shall

1. Cease and desist from

(a) Promising an apprenticeship program, or any other benefits, to employees in an effort to dissuade them from voting for the Union.

(b) Ordering employees to remove union insignia from their flight helmets.

(c) Interrogating employees about how they voted in the election.

(d) Implicitly threatening to lay off or discharge employees if they voted for the Union.

(e) Threatening to assault a union organizer in the presence of employees

(f) Telling employees that the Company's pilots would refuse to fly with union linemen.

(g) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 8(a) (1) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Miami, Florida, and at any other locations where unit employees may be assigned, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant To a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since October 25, 2001.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the proceeding in Case 12-RC-8721 be severed and remanded to the Regional Director for Region 12 for further action consistent with this Decision.

Dated, Washington, D.C. April 28, 2003

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT promising an apprenticeship program, or other benefits to employees in an effort to dissuade them from voting for the Union.

WE WILL NOT order employees to remove union insignia from their flight helmets.

WE WILL NOT interrogate employees about how they voted in the election.

WE WILL NOT threaten to lay off or discharge employees if they vote for the Union.

WE WILL NOT threaten to assault a union organizer in the presence of employees.

WE WILL NOT tell employees that the Company's pilots would refuse to fly with union linemen.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the rights guaranteed to them by the Act.

AIR 2, LLC